

The Honorable Ronald B. Leighton

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STORMANS, INCORPORATED, et al.,
Plaintiffs,

vs.

MARY SELECKY, Secretary of the Washington
State Department of Health, et al.,

Defendants,

and

JUDITH BILLINGS, et al.,

Intervenors.

Civil Action No. C07-5374 RBL

MOTION FOR LEAVE TO AMEND
COMPLAINT

Date of Consideration: May 13, 2011

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs seek leave to amend their complaint to (1) include *ella*, an emergency contraceptive drug approved by the Federal Drug Administration (“FDA”) after this action was stayed in July 2010, and to (2) clarify their substantive due process claim under the Fourteenth Amendment. Intervenor Defendants do not oppose this motion. Defendant State

1 does. Plaintiffs' proposed Second Amended Complaint in redline format is attached as
 2 Exhibit A to the Declaration of Steven T. O'Ban, filed herewith.

3 II. FACTS

4 Plaintiffs filed this action against the Board of Pharmacy on July 25, 2007 and
 5 amended it the next day. Declaration of Steven T. O'Ban ("O'Ban Decl."). Trial is currently
 6 set for November 28, 2011.

7 In August 2010, the FDA approved a new drug, *ella*, for distribution as an emergency
 8 contraceptive. O'Ban Decl., Exhibit B. This drug was not previously available, but is now
 9 "stocked in most pharmacies." O'Ban Decl., Exhibit C. Prescriptions can also be obtained
 10 and filled online. *Id.* According to the website, the drug operates to prevent pregnancy after
 11 unprotected sexual intercourse by "delaying ovulation...for 5 days" or "by preventing
 12 attachment [of a fertilized egg] to the uterus." O'Ban Decl., Exhibit D.

13 The Rules require Plaintiffs to stock and dispense *ella* in violation of their deeply held
 14 religious beliefs.

15 Plaintiffs pled Fourteenth Amendment claims in their Amended Complaint, including
 16 a violation of Plaintiffs "fundamental right of liberty of conscience." O'Ban Decl., Exhibit A,
 17 ¶66. Plaintiffs seek to clarify their Fourteenth Amendment claims by more clearly setting
 18 forth their substantive due process claim in their complaint.¹

19 III. AUTHORITY AND ARGUMENT

20 Leave to amend is discretionary and the Federal Rules of Civil Procedure and federal
 21 case law direct that leave shall be "freely given when justice so requires." Rule 12(a). The

22 ¹Plaintiffs previously discussed the legal authorities supporting the substantive due process claim in their
 23 Consolidated Response to State Defendants' and Defendant-Intervenors' Motions for Summary Judgment, Dkt.
 #401.

1 U.S. Supreme Court instructs that “this mandate is to be heeded.” *Foman v. Davis*, 371 U.S.
 2 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) (*citing* 3 Moore, Federal Practice (2d ed.
 3 1948), 15.08, 15.10.).

4 Leave should be granted where it will “facilitate a proper decision on the merits” and
 5 denied only in the limited circumstances where the “movant acts in bad faith” or denial is
 6 necessary to prevent “undue prejudice” to the opposing party. *Howey v. U.S.*, 481 F.2d 1187,
 7 1190-91 (9th Cir. 1973); *U.S. ex rel Lee v. SmithKline Beecham Inc.*, 245 F.3d 1048, 1052 (9th
 8 Cir. 2001). Courts may “consider the presence or absence of undue delay, bad faith, dilatory
 9 motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the
 10 opposing party and futility of the proposed amendment.” *Lee*, 245 F.3d at 1052 (*quoting*
 11 *Moore v. Kayport Package Express, Inc.*, 885 F.3d 531, 538 (9th Cir. 1989)). Moreover, there
 12 is a “strong policy to permit the amending of pleadings,” and to allow an amendment to “state
 13 a potentially valid claim,” even where there has been some delay in raising the claim. *Howey*,
 14 481 F.2d at 1190-91. It is an abuse of discretion to deny a motion for leave without one of
 15 these apparent and articulated reasons for the denial. *Id.* at 1191; *Foman*, 371 U.S. at 182.

16 None of the reasons for denial even remotely apply here. *Ella* had not been approved
 17 when Plaintiffs filed their complaint. O’Ban Decl., Exhibit B. It was only approved by the
 18 FDA in August 2010 and, therefore, only recently became available in “most pharmacies.”
 19 *Id.*, Exhibit C. Plaintiffs’ civil rights will be violated every bit as much if they are forced to
 20 distribute *ella* as they will be if forced to dispense Plan B. Intervenor do not object. Justice
 21 requires that Plaintiffs be permitted leave to amend and add *ella*.

22 Plaintiffs also seek to amend their complaint to clarify that their Fourteenth
 23 Amendment claims include a substantive due process claim. The Due Process Clause

1 “provides heightened protection against government interference with certain fundamental
 2 rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct.
 3 2258, 138 L. Ed. 2d 772 (1997). The Fourteenth Amendment “forbids the government to
 4 infringe ... ‘fundamental’ liberty interests at all, no matter what process is provided, unless the
 5 infringement is narrowly tailored to serve a compelling state interest.” *Reno v. Flores*, 507
 6 U.S. 292, 301-302, 113 S. Ct. 1439, 123 L. Ed. 2d. 1 (1993).

7 In their Amended Complaint, Plaintiffs’ pled a violation of Plaintiffs’ “fundamental
 8 right of liberty of conscience.” O’Ban Decl., Exhibit A, ¶66. Plaintiffs wish to clarify that
 9 the State’s violation of their fundamental right is a substantive due process claim.

10 To facilitate a proper decision on the merits, Plaintiffs must have the opportunity to
 11 litigate this valid claim. Defendants will not be prejudiced by the amendment, as trial is not
 12 set until November 28, 2011, and the claim was fully briefed in Plaintiffs’ response to the
 13 Defendants’ summary judgment motion filed in May 2010. Intervenor’s do not object.
 14 Accordingly, the Court should grant leave to clarify its substantive due process claim.

15 IV. CONCLUSION

16 Amendment of the Complaint is necessary to add claims that were not available
 17 initially or are proper to promote the full litigation on the merits of this case. Denial is not
 18 necessary to prevent undue delay, bad faith or bad motive. Therefore, justice requires that the
 19 amendments be allowed. This Court should grant Plaintiffs leave to amend the Complaint. A
 20 copy of the proposed Second Amended Complaint is attached.

21 Respectfully submitted this 28th day of April, 2011.

22 By: s/ Steven T. O’Ban

23 Steven T. O’Ban, WSBA No. 17265

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